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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 732

H. J. JENKINS,

Petitioner,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

HARRY G. WALTNER, JR.,
SIZER & MYRES,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, H. J. Jenkins, respectfully shows as grounds for the issuance of a writ of certiorari to the Supreme Court of the State of Missouri.

A.

Summary Statement of the Material Involved.

This is an action for damages for permanent bodily injuries suffered by petitioner while acting within the scope of his duties as an employee of respondent. The action

was brought under the Federal Employers' Liability Act (45 U. S. C. A.). A trial judgment of twelve thousand dollars ($12,000) was rendered in petitioner's favor, which was reversed outright on appeal to the Supreme Court of Missouri on the theory that petitioner's failure to make the engineer of respondents' train *understand* a warning of danger on the track ahead barred any recovery at all for injuries resulting from respondent engineer's negligence. There was no dispute as to the applicability of the Federal Employers' Liability Act.

Petitioner was the fireman on a second class train, No. 630, operated by respondent, carrying freight in interstate commerce (R. 20). The engineer and conductor, who had complete charge of the train (R. 20, 33) received orders to leave Arkansas City, Kansas for Winfield, Kansas at 6:30 (R. 136-137), which was 20 minutes after respondents' train No. 1229 left the same place for the same town on the same track (R. 137). Respondents' track approaches the town of Winfield from the southwest as shown on Exhibit "A," the track making a large "S" curve before intersecting the track of the Santa Fe Railroad (running almost north and south) at a point identified as "M. P. 501" and running thus into Winfield. Respondents' train, in approaching Winfield, descended a long grade of 1% for 2¼ miles (Respondents' Exhibit 1) crossing successively the Walnut River Bridge, bridge over county road, the yard limit sign, abandoned inter-urban crossing, public road crossing adjacent to city park and track before completing the "S" curve.

Petitioner was injured on July 20, 1937 (R. 23) while it was daylight and the sun was shining (R. 114) by reason of train 630 running into the rear of train 1229 at end of the "S" curve at a point 4½ poles (176 feet per pole, R. 61) before reaching the intersection of the Santa Fe track (Exhibit "A"). Train 1229 had been left on the track by

its crew while watering the engine in Winfield. It was the established custom for northbound freight trains to pull up to the Santa Fe intersection, disconnect the engine from the cars, pull up to the water tank about two blocks north and after filling with water, back up and connect with the train and go on (R. 56, 57, 112, 113).

As respondents' train proceeded around the end of the "S" curve, petitioner for the first time could see train No. 1229 (R. 35). Petitioner could not see train No. 1229 because of the obstruction of view by a light plant (R. 28) and by trees, bushes and underbrush along the respondents' right-of-way and within forty to sixty feet of the tracks on the fireman's side (R. 28, 30, 63, 64, 65). These were in full foliage (R. 30). Petitioner could not see the caboose looking straight down the track (R. 32) and respondents' brakeman, Felton, testified that the caboose could not be seen until the trees had been passed (R. 123). Immediately upon passing the trees, petitioner shouted a warning to respondents' engineer (R. 35). Petitioner was 5 or 6 feet from the engineer when he yelled the warning (R. 37) under which circumstances the two could hear each other in an ordinary conversation (R. 76, 78). Respondents' witness testified that petitioner gave the engineer violent stop signals with his hands as he crossed the deck to jump (R. 118). The engineer did not put on the brake, but "looked like he thought I was joking him" (R. 36). When the engineer did nothing and a collision was imminent (R. 71, 74), petitioner jumped from the train (R. 37), resulting in substantial injuries (R. 41, 44, 82, 87, 89).

There is evidence in the case that the engineer had an unobstructed view of the track on which the caboose stood about 14 poles, or one-half mile, before the point of collision, and from which point the fireman could not see the track because of the curve (R. 153). This evidence was given

by respondents' witness who was called by petitioner when respondent failed to put him on the stand (R. 156).

The Supreme Court of Missouri, by its opinion, held that petitioner was not entitled to recover because, although the warning was given in "language, which if understood, would have advised the engineer of the danger," was not understood by the engineer and therefore, because there was no evidence (so the court said) that the engineer *understood* the notice, there was no "substantial evidence that plaintiff (petitioner) *notified* the engineer to go into 'emergency,'" and therefore no case was made for the jury.

Thereafter, on the 17th day of March, 1940, petitioner filed a preliminary motion for rehearing, and on the 1st day of June, 1940, filed a supplemental motion for rehearing in the Supreme Court of Missouri, which was overruled on the 28th day of June, 1940. Thereafter, on the 8th day of July, 1940, petitioner filed a motion to modify the opinion so as to direct the remanding of the case for new trial, which was supported by an extensive affidavit, which was overruled on September 4, 1940. Thereafter, on the 14th day of September, 1940, petitioner filed a motion to transfer said cause to the Supreme Court of Missouri *en banc*, which was overruled on October 31, 1940. Petitioner has therefore exhausted all remedies available save and except this Writ of Certiorari.

By this decision of the Supreme Court of Missouri, petitioner, an employee of an interstate railroad corporation, has been denied the benefits provided for him under the Federal Employers' Liability Act. If this decision is the law in cases under the Federal Employers' Liability Act, every plaintiff will have to establish, not only that a warning or signal or notice was given, *but that such warning, signal or notice was received and understood*, and any failure by a plaintiff to make such showing constitutes,

under the decision to be reviewed, primary negligence, barring *any* recovery, rather than contributory negligence reducing the amount recoverable. The court cited no authority for its decision, and indeed none can be found. The issues in the trial court were made up on the theory that respondents' engineer was negligent in failing to hear or understand the warning given, both sides including this in the instructions given (Instruction "C", R. 174 and Instruction "2," R. 168.) Failure of the fireman to give an adequate warning, or to give any warning to the engineer can, under the decisions of this Court, only constitute contributory negligence, reducing rather than barring, a recovery.

B.

Basis of Jurisdiction.

The judgment of the Supreme Court of the State of Missouri determined the rights claimed under the Federal Employers' Liability Act. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code Annotated, Title 28, Section 344, and particularly Section 344b thereof).

C.

Questions Presented.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act (April 28, 1908, Chapter 149, 35 Stat. 65, as amended August 11, 1909, c. 685, 53 Stat. 1404, 45 U. S. C. A. 51, *et seq.*):

(1) Can this Court determine from the record in this case that the engineer of the train "understood" the fireman's signal of danger ahead from the statement that, in response to the fireman's warning or signal, the engineer

turned his head and "looked like he thought I was joking him."

(2) Is a fireman, calling or signalling a warning or signal to the engineer of danger ahead, required to prove the engineer "understood" or "comprehended" the warning or signal if he uses terms or means appropriate for that purpose?

(3) Is a fireman who has given a danger warning, signal or notice to an engineer who is his superior and is in charge of the train, guilty of more than contributory negligence if the engineer fails to "understand" or "comprehend" such notice and the fireman does nothing further about it and is injured because of the failure of the engineer to "understand" an appropriate warning and act thereon, stopping the train.

D.

Reasons Relied On for the Allowance of the Writ.

(1) The Federal Employers' Liability Act provides that contributory negligence shall not bar recovery, but shall reduce the amount recoverable by a certain proportion. This is applicable to the instant case because the Supreme Court of Missouri, by holding petitioner must prove the engineer understood the warning and signal, necessarily determines that a failure to give a warning or signal which is understood, or a failure to repeat such warning or signal until it is understood, constitutes sole primary negligence barring a recovery. As the engineer was under an absolute duty to know the way ahead was clear, and at one point could have personally seen that the way was not clear, and as he should, under the circumstances of the case, as contended for by respondents, anticipated the probability of a warning or signal from petitioner, the decision of the Supreme Court of Missouri is erroneous and should be set

aside. Even that court could find no authority upon which to base its decision.

(2) The Supreme Court of Oklahoma, in the case of *Kurn et al., Trustees,* v. *Reese, Administratrix,* No. 29456, decided September 24, 1940 (not yet reported, but appearing in The Journal, issued by the Oklahoma Bar Association, September 28, 1940, Vol. 11, No. 26, pp. 947-950), has held that the administratrix of the engineer of this train of which your petitioner was the fireman, was entitled to judgment under the Federal Employers' Liability Act, but that the jury properly reduced the amount recoverable because of the negligence attributable to said engineer. Thus, we have an erroneous application of the Federal law in petitioner's case, depriving petitioner of any benefits under the Federal Act, while the Supreme Court of Oklahoma, recognizing that there was negligence both on the part of petitioner and the engineer, has granted to the engineer's widow an award.

(3) The principle which has been laid down by the Supreme Court of Missouri in the instant case is far reaching in its effect, and if applied to other similar cases (and there is no reason to believe it will not be so applied), a very substantial group of individuals intended to be beneficiaries of the Federal Employers' Liability Act will be denied all benefit of that Act.

(4) Although it is recognized that this Court has been occupied with matters of considerable moment in the past two years, it has been the subject of comment that no decisions involving the Federal Employers' Liability Act have been rendered for over two years. As a result thereof, inferior courts have proceeded to determine all issues under this Federal law without the supervising influence of this Court, with the result that they have strayed away from the principles laid down by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under seal of this Court, directed to the Supreme Court of Missouri, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of *H. J. Jenkins, Respondent,* v. *James M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company,* a corporation, No. 36340, to the end that this cause may be reviewed and determined by this Court, as provided for in the statutes of the United States, and that the findings of said Supreme Court to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

HARRY G. WALTNER, JR.,
Attorney for Petitioner H. J. Jenkins,
Jefferson City, Missouri.

SIZER & MYRES,
Monett, Missouri,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in *H. J. Jenkins, Respondent,* v. *Kurn and Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, Appellants,* is reported in 144 S. W. (2d) 76 (not yet reported in official reports).

II.

Statement as to Jurisdiction.

The petitioner, in support of the jurisdiction of this Court to review the above cause on writ of certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code, Title 28, Section 344), which provides in part as follows: (Section 344b)

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

B.

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered on May 17, 1940 (R. 185). Petition for Rehearing was duly filed (R. 192). On June 28, 1940, Motion for Rehearing was denied (R. 227). Motion to Modify Opinion was duly filed (R. 227), and on September 4, 1940 overruled. Motion to Transfer Cause to the Supreme Court of Missouri *en banc* was duly filed and denied October 31, 1940 (R. 246), and the judgment then became final. *State ex Rel. McGrew Coal Company* v. *Ragland*, 339 Mo. 452, 456, 458, 97 S. W. (2d) 113.

C.

Nature of Case and Ruling Below.

Suit was brought under the Federal Employers' Liability Act, and there was no issue as to petitioner being engaged in interstate transportation and governed by the provisions of that Act. Injuries were sought to be recovered on the basis of the negligence of the engineer of the train on which petitioner was a fireman, to hear or to understand the notice, signal or warning given by petitioner of danger ahead (being another train standing on the track), and the negligence of said engineer in failing to promptly and immediately stop the train, which could have been done, in time to have avoided the collision. The issues were presented to the jury by both sides on this theory, and upon reviewing the judgment for petitioner, the Supreme Court, ignoring the fact that petitioner's only duty was to give to the engineer a reasonable notice, signal or warning, and ignoring the fact that petitioner's failure to have done this could only constitute contributory rather than primary negligence, reversed the judgment outright without a remanding of the case, thus entirely depriving petitioner of the benefits of the Act.

D.

Cases Believed to Sustain Jurisdiction.

The action of the Supreme Court in this case is, so far as we have been able to determine, without precedent, either in this State or in other States. However, it is clear that no one entitled to the benefits of the Federal Employers' Liability Act can be deprived thereof by a decision which is not reviewable by this Court. The following decisions sustain petitioner's assertion of jurisdiction in this Court:

Brady v. *Terminal Railroad Association*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 431;

Toledo Railroad Company v. *Slavin,* 236 U. S. 454, 35 S. Ct. 306, 59 L. Ed. 671;
Chicago Railroad Company v. *Devine,* 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140;
Seaboard Airline Railroad Company v. *Horton,* 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

III.

Statement of the Case.

In the interest of brevity, petitioner does not here make a statement of the case, since the full statement has been given under heading "A" in the Petition for Writ of Certiorari.

IV.

Specification of Errors.

(1) The court erred in holding that the failure of respondents' engineer to understand or comprehend the signal, warning or notice given, barred petitioner's right to recovery.

(2) The court erred in determining from the evidence that there was not a scintilla of evidence in the record that respondents' engineer understood or comprehended the notice, warning or signal given him by petitioner.

(3) The court erred in failing to hold that petitioner's acts, or failure to act, could constitute but contributory negligence, reducing rather than barring petitioner's recovery of damages for the injury sustained.

(4) The court erred in failing to hold that petitioner's only duty and responsibility was to advise respondents' engineer by means appropriate to that end, that there was danger ahead and that the train should be stopped.

(5) The court erred in failing to hold that respondents' engineer was primarily and absolutely required, under respondents' rules, to have the train under control immediately prior to and at the time of the collision, and that therefore no act or failure to act on the part of the petitioner could constitute more than contributory negligence.

V.

Summary of Argument.

(1) Respondents' engineer understood the notice, warning or signal but failed to apply the brakes and stop the train. When the petitioner shouted warning to respondents' engineer, he turned his head toward petitioner and "Looked like he thought I was joking him" (R. 36). Although the Supreme Court of Missouri said there wasn't a scintilla of evidence that respondents' engineer understood the warning, that evidence is in the record and this Court is not concluding a finding of fact or a mixed finding of law and fact made by a state court when reviewing a state court decision denying a claimed Federal right.

Northern Ry. Co. v. *State of Washington,* 300 U. S. 154; 57 S. Ct., 397; 81 L. Ed. 573;

Norris v. *Alabama,* 294 U. S. 587; 55 S. Ct. 579; 59 L. Ed. 1074;

Johnson Oil Co. v. *Oklahoma,* 290 U. S. 158; 54 S. Ct. 152; 78 L. Ed. 238.

The warning being given in an appropriate manner, which is conceded in the opinion below, and respondents' engineer having understood and comprehended it but disbelieving it, and failing to act upon it, respondents must answer in damages for such negligence.

(2) The Supreme Court of Missouri actually holds that petitioner is guilty of negligence which is the sole proxi-

mate cause of the injury complained of because the respondents' engineer failed to understand the warning given him of the danger ahead. This Court will look through the veil to the substance.

Northern Ry. Co. v. *Washington*, 300 U. S. 154, 57 S. Ct., 397, 81 L. Ed. 573;

Central Vermont Ry. Co. v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

Petitioner was but the fireman on the train and had neither the authority nor the physical means to slow or stop the train. Under the rules, the engineer and conductor were responsible for the train, and petitioner had no duties under the rules but to assist the engineer. Such being the case, petitioner's negligence could not have been the *sole* proximate cause of the collision. Had petitioner wholly failed to warn respondents' engineer of the danger, this could have been but contributory negligence on petitioner's part, for the engineer had an absolute duty to know the track was clear. As a warning was given, at most it was inadequate (assuming it was petitioner's fault that the engineer did not understand and further assuming it was inadequate, although the lower court held it was appropriate for the purpose) and so could constitute but contributory negligence, reducing the amount of, but not barring a recovery by petitioner.

Gillis v. *Atlantic Coast Line Ry. Co.*, 175 S. Ct. 223, 179 S. E. 62, Certiorari Denied, 294 U. S. 718, 55 S. Ct. 545, 79 L. Ed. 125;

Washington and O. D. Ry. Co. v. *McPherson*, 29 F. (2d) 989, Certiorari Denied, 278 U. S. 610, 49 S. Ct. 13, 75 L. Ed. 535;

Jones v. *Administrator*, 171 Ky. 11, 186 S. W. 877;

Tate v. *Chicago, M. St. P. & P. R. R. Co.*, 172 Wash. 33, 19 Pac. (2d) 137, Certiorari Denied, 290 U. S. 631, 54 S. Ct. 50, 78 L. Ed. 549;

Rocco v. *Lehigh Valley Ry. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743;
Union Pacific R. R. Co. v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751;
Friese v. *Chicago, Burlington & Quincy R. R. Co.*, 290 Mo. 501, 235 S. W. 97, 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131;
Pennsylvania v. *Sheeley*, 221 Fed. 901;
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Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 41 S. Ct. 91, 73 L. Ed. 224;
Lockridge v. *Western & Atlantic R. R. Co.*, 170 Ga. 208, 152 S. E. 474, Certorari Denied, 281 U. S. 762, 50 S. Ct. 461, 74 L. Ed. 1171;
Miller v. *Central Ry. Co. of N. J.*, 58 F. (2d) 635;
Kurn et al. v. *Reese*, The Journal (Oklahoma Bar Association) Sept. 28, 1940; Vol. 11, No. 26, p. 547 (Not yet otherwise reported). See Appendix A.

VI.

ARGUMENT.

1.

Petitioner takes sharp issue with the lower court's conclusion that there is no evidence of respondents' engineer's understanding of the warning, signal or notice given. There is clear evidence in the record that he *heard* petitioner shout to stop the train, and petitioner's testimony that respondents' engineer looked as thought he thought petitioner were joking, is a clear statement of fact relating the expression on the engineer's face, which is definite and specific evidence of the engineer's understanding and comprehension, but disbelief. It is difficult to follow the reasoning of the lower court on this point, for they assume the engineer's

inactivity is due to lack of understanding from the fact that he did not, at the time of receiving the warning, apply the emergency brake, solely because they assume he did not intend self-destruction. This assumes the engineer knew that failure to apply the brake would result in his death (there is no evidence in the record to support this assumption) and of course, ignores the plain statement of fact as to the engineer's response to the warning being one of disbelief and it also ignores an equally strong presumption which is as equally self-evident, and that is that the engineer became confused, or to put it commonly, got "buck fever," and did not apply the emergency brake until it was too late. No authorities need be cited to sustain petitioner's contention that if the warning, signal or notice were understood, that the judgment and decision of the lower court should be reversed.

That this Court will review the record on such point is well established by the decisions of this Court. When any State court denies a claim to Federal right, this Court has many times held that it is not concluded by any finding of fact or by any mixed finding of law and fact, made by the State court.

Northern Ry. Co. v. *State of Washington,* 300 U. S. 154, 57 S. Ct., 397, 81 L. Ed. 573;

Norris v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 59 L. Ed. 1074;

Johnson Oil Co. v. *Oklahoma,* 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238.

This Court, under the above decisions, will not permit any State court decision to stand, which by placing a technical meaning on the word "notify" requires and demands of beneficiaries of the Federal Employers' Liability Act, a burden greater than that required under the law. Such is the effect of the decision of the Supreme Court of Missouri

in the instant case, for while apparently holding petitioner to a technical construction of that term as used in petitioner's instructions, the Supreme Court of Missouri has not been so careful to hold respondents to the theory upon which they tried this case in the trial court. It will be recalled that in the statement of the case, reference is made to the fact that respondents joined with petitioner in the trial court in presenting this case to the trial court and to the jury on the theory that the engineer's failure to understand an appropriate warning was negligence. The respondent instructed the jury on that point (R. 174), directing a verdict for defendants (respondents here) if, among other things, they found the engineer "was not negligent in failing to hear or understand said warning."

The substance of the decision in this case is that the failure of respondents' engineer to understand and comprehend a warning given him by petitioner using appropriate means constituted sole primary negligence on the part of petitioner, barring completely petitioner's action. This is in direct conflict with the construction placed upon the Federal Employers' Liability Act by this Court, as such failure can only constitute contributory negligence.

As heretofore urged, this Court will go into the record of the case when a Federal right has been denied. It has always been held that this Court would pass upon the substance of a contention and would brush aside any decision not based on substance defeating a claimed Federal right.

Northern Ry. Co. v. *State of Washington, supra;*
Central Vermont Ry. Co. v. *White,* 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

In considering the substance of this case, the lower court, without authority or precedent, has denied petitioner's rights under the Federal Employers' Liability Act. Without conceding that respondents' engineer did not "under-

stand'' the warning, we urge that in no other case has this ''understanding'' of a warning been required. In the case of *Gillis* v. *Atlantic Coast Line Ry. Co.*, 175 S. C. 223, 179 S. E. 62, the Supreme Court of South Carolina recognizes that under the Federal Employers' Liability Act, the question of contributory negligence is peculiarly within the province of the jury, and in that case held that the jury was to decide the right of Gillis to benefits under the Act on the basis of whether or not he ''gave the proper signal to the engineer to stop the train.'' In that case, as in the instant case, the engineer failed to stop the train, but the court held that the jury was the sole judge of the issues, recognizing that the only obligation on the part of Gillis was to give the signal, not to insure its receipt and understanding by the engineer. l. c. S. E. 64. This court refused to review that decision (294 U. S. 718, 55 S. Ct. 545 and 79 L. Ed. 125).

In the case of *Washington and Old Dominion Ry. Co.* v. *McPherson*, 29 F. (2d) 989, the court of appeals of the District of Columbia had for consideration a case very similar to the instant case in respect to the facts. McPherson was a brakeman on a work train. In his operations he had been taken away from the immediate vicinity of his own train and was directed by appropriate authority to return to it. In doing so, he was directed to take passenger train #12, which he boarded, reporting to the motorman, and telling the motorman to look out for the work train ahead. Passenger train #12 stopped at the next stop and McPherson alighted to obtain information by wire as to a more exact location of his work train. After discharging and taking on passengers, train #12 pulled out. McPherson approached the train, standing with his right foot near the rail, and waving a red flag, which was the signal to stop (p. 991). Patterson, the engineer, looked at McPherson, but did not slow the train or otherwise give any indication of seeing McPherson, but there was nothing to prevent him from see-

ing the red flag. However, he gave no indication of any understanding or comprehension of the stop signal, McPherson, thinking the train not going too fast to board, and being required to board it to follow the instructions given him, attempted to jump on the train, missed the step and was severely injured. In no place in this case will be found any finding that the motorman or engineer of the train understood or comprehended the warning, but it is reasonably and fairly required that the motorman had a duty to see the red flag when it was waved close to the track. As under the rules, red was a danger signal, trainmen and others were required to heed it. This Court refused to review the decision in that case, denial of the application for certiorari being recorded at 278 U. S. 610, 49 S. C. 13, 75 L. Ed. 535.

See also *Jones* v. *Administrator*, 171 Ky. 11, 186 S. W. 877; *Tate* v. *Chicago, M. St. P. & P. R. R. Co.*, 172 Washington 33, 19 Pac. (2d) 137; Certiorari Denied, 290 U. S. 631, 54 S. Ct. 50, 78 L. Ed. 549.

The cases of *Rocco* v. *Lehigh Valley Ry. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743 and *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751, and *Friese* v. *Chicago, Burlington & Quincy R. R. Co.*, 290 Mo. 501, 235 S. W. 97, 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131, clearly show that your petitioner was guilty only of contributory negligence. In these cases, the principle has been laid down that where it is necessary for an employee to act through or with others, and in connection therewith the employee is negligent as a result of which injuries occur, yet if those injuries are due in whole or in part to the act or failure to act on the part of others, whether they be officers, agents or employees, the first employee's negligence but contributes to the injury or damage, and as a result the jury must reduce his damages in proportion to his contribution.

In the instant case, your petitioner was but an assistant to respondents' engineer. Under the rules in evidence, the

engineer and the conductor were in charge of the train. In them rested the authority to direct its movements. Your petitioner had no authority whatever to check, slow down or stop the progress of the train. Therefore, no matter what he might have done, he was wholly dependent upon respondents' engineer to take appropriate action to avert injury and damage. In the *Rocco* and *Hadley* cases, *supra*, this Court has determined that in cases wherein the plaintiff did not have the means at hand or the authority to avert the damage or injury, that he was guilty of but contributory negligence and entitled to recover. In the *Friese* case, this Court dealt with a situation similar as to the physical facts to that before us here. Suit was brought to recover for the death of the engineer who had proceeded to cross a railroad grade crossing, operating a Burlington freight train which was run into at the crossing by a Wabash train coming from the left into the intersection. As the Wabash train was approaching from the left, the engineer was wholly unable to personally observe the approaching train, and relied upon his fireman for warning or signal. It was strongly urged that the fireman was negligent in failing to properly warn the engineer and that as the engineer was wholly dependent upon the fireman to advise him of the danger, recovery could be had under the Federal Employers' Liability Act. After referring to a statute which placed on the engineer the duty of ascertaining that the way was clear before entering the crossing, this Court held that this was a positive duty of the engineer which he could not escape, and that his failure constituted the sole and primary cause of the injury. In the instant case the rules of the respondent specifically require that when the train is within yard limits (this collision occurred within the yard limits), it must be under control and that the *engineer* must know that the way ahead is clear. Under such circumstances, the duty rested on respondents' engineer to know that the way

ahead was clear before proceeding, and his act in proceeding as he did constituted negligence. Therefore, the instant collision could not possibly be due to the sole primary negligence of your petitioner.

In the case of *Pennsylvania* v. *Sheeley*, 221 Fed. 901, the Circuit Court of Appeals, 6th Circuit, passed upon a case very similar in fact to the instant case. Sheeley was the fireman. His engineer disregarded cautionary and stop signals and ran into a train standing on the track, resulting in the death of the engineer. It was urged that the rules and practice of the company placed upon Sheeley the duty to cooperate with the engineer in observing signals and in obeying them. It was urged that when the engineer disobeyed the warning, Sheeley should have found out why. The court there stated (p. 904):

> "The proofs * * * show that Sheeley did nothing in this direction until it was too late * * * At most, the defendant's proofs tended to make a case of contributory negligence and thus to diminish the damages."

No requirement was made in that case that the fireman, to recover, must prove the engineer "understood" the signals or "call". There is no evidence in that case that the engineer "understood" the signals or "call", in fact the engineer proceeded without any indication of "understanding" until it was too late to do anything about it just as he did in the instant case.

The cases of *Davis* v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33; 69 L. Ed. 212 and *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139; 73 L. Ed. 224; 41 S. Ct. 91, are not applicable to the instant case. These cases are distinguishable on two logical grounds: (1) the individual seeking recovery, or in respect to whom recovery was sought, was in actual command and had both the means at hand and the authority to determine the movement of the train, and (2) the indi-

vidual seeking recovery, or in respect to whom recovery was sought, was guilty of the violation of a specific order or rule having unquestioned application and requiring definite and specific action which could be only satisfied by doing a particular thing in a particular way.

In respect to the first point, the Supreme Court of Georgia, in the case of *Lockridge* v. *Western & Atlantic R. R. Co.*, 170 Ga. 208; 152 S. E. 474, Certiorari Denied 281 U. S. 762, 50 S. Ct. 461, 74 L. Ed. 1171 pointed out that these cases had no application as applied to a fireman, such an employee "being a mere underling whose relation to the operation of the train was secondary" (Ga. p. 212) and that the fireman could recover on account of the negligence of the engineer in charge of the train, even if "the fireman may also have been negligent in failure to perform his duty in assisting the engineer in operating the train." In this connection, it cannot be overemphasized that respondents' engineer was guilty of the grossest negligence in failing to act upon the warning given by petitioner. It should be remembered that the train was going around a left-hand curve and that thereby the fireman knew that if danger was ahead he would most likely receive a signal or warning from petitioner. Also, respondents proved that it was usual and customary for trains to stop at the point where the collision occurred, so that water could be taken on by the engine on down the track. Therefore, respondents' engineer, being fully advised of it and being unable to see from his side of the engine at this point, should have been awaiting a message on that subject. Further, it was established by respondents that the respondents' engineer knew that the extra train was just twenty minutes ahead and therefore could reasonably anticipate that at this particular point there might be danger that the extra train had not yet pulled out. Add to this the fact which came out upon examination of one of respondents' wit-

nesses, (such information being a surprise to petitioner) that respondents' engineer could have seen, had he been observing, the train standing at the crossing when petitioner's train was back about one-half mile from the crossing. Such view on the part of the engineer was a view down the track rather than across the fields. See also petitioner's affidavit attached to the Motion to Modify (R. 230). All of these factors definitely indicate the negligence of respondents' engineer and all but the last of them are factors which should have prompted respondents' engineer to be receptive to any kind of a signal warning or notice from your petitioner.

In the *Hadley* case, *supra,* deceased had been a brakeman on a freight train, which, while standing on the main line was hit from the rear by another train. It was urged that if deceased had complied with the rules and gone back to warn the following train by torpedoes and lights, the accident would not have occurred.

In this case, Mr. Justice Holmes stated, (U. S. 333, L. Ed. 775):

> "But it is said that, in view of the defendants' conduct, the only approximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another, when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

Here too, we must look at the situation as a "practical unit." All of the factors above considered, together with

the testimony that petitioner and the engineer could carry on an ordinary conversation in the cab, being only five feet apart (R. 37), and that the engineer's hearing was normal (R. 76-78) and that petitioner spoke in a very loud voice, shouting (R. 35, 36), it is inconceivable that only the grossest negligence on the part of the engineer is a satisfactory explanation of his conduct.

In both of the foregoing cases, violation of rules was involved. From these cases and comparing these cases with the *Davis* and *Caldine* cases, *supra*, it appears that there is clearly a distinction in respect to the type of rules which, when violated, constitute a bar to the action rather than contributory negligence. As stated by the Circuit Court of Appeals, 2nd Circuit, in the case of *Miller* v. *Central Ry. Co. of N. Jersey*, 58 F. (2d) 635, 637:

> "All these decisions involved specific precautions for specific occasions; the stopping of a train at a given spot until another passed or until the track was clear. No doubt the doctrine is not confined to train movements; * * * but it does not seem to us to extend to rules generally enjoining caution or responsibility—in spite of some of our language to the contrary * * * If it did, an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law makes a condition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; * * *"

In the *Davis* and *Caldine* cases, there was only one way that those orders and rules could be obeyed and there was no opportunity for the exercise of any discretion or judgment in connection therewith. In the instant case, however, there are many ways in which the warning, signal or notice might be given. In fact, the evidence showed that it was given in two ways; first, by a shouted warning to put on

the emergency brake (R. 35, 36, 77) and second, by the giving of violent stop signals with the arms (R. 118), either of which signals are recognized as being adequate and sufficient. However, there are many other ways in which the rule could have been complied with, and therefore it is wholly unreasonable to say in the instant case that the failure to give the warning in a particular way should bar petitioner's action. Whether or not additional or different warnings had been given and with different results, is entirely speculative and presents a situation comparable to that in the *Rocco* case, *supra*, wherein it was determined that even if the inquiry had been made complying with the rule, there could be no logical conclusion reached that a different result might have come about. The decision in this case presents a situation suggested in the *Miller* case, *supra*. Plaintiff did perform an act, warning, signalling or notifying respondents' engineer of the danger. If the doing of that act was not quite sufficient or if it were done in a manner not quite effective, all that petitioner can be guilty of is failing to perform to perfection a duty which is required from a very general rule and a duty in respect to which there is no measuring stick by which its adequacy or sufficiency can be judged. Accordingly, petitioner urges that the law in Missouri, as established by the opinion in the instant case, entirely vitiates the Federal Employers' Liability Act in that it eliminates the direction in that act that contributory negligence shall reduce but not deny damages.

The situation in the instant case is particularly worthy of consideration of this Court in that the Supreme Court of Oklahoma, in the case of *Kurn et al., Trustees*, v. *Reese* (not yet reported, but appearing in The Journal issued by the Oklahoma Bar Association, September 28, 1940, Vol. 11, No. 26, pp. 947-948-949-950), has passed upon the right of the engineer's administratrix to recover for

the death of the engineer. The only issue before the Oklahoma Supreme Court was the propriety of the overruling of the defendant's demurrer to the plaintiff's evidence. In this case, while not admitting that the engineer was guilty of negligence, the point presented was whether or not the negligence of the fireman in not giving the engineer warning was or was not the primary cause of the accident. The respondents herein defended that case and "based the defense upon the alleged primary negligence of the engineer in failing to observe a special rule with respect to keeping the train under control." In that case, as in the case under consideration, "the evidence is in almost hopeless conflict as to when and how much the engineer and fireman could see, and when either of them could have seen train 1229 first." The Supreme Court of Oklahoma, in ruling this question, stated:

> "The evidence is conclusive that deceased knew that train 1229 was in front of him, and his running orders gave him all the information needed, and all that he did not know was its exact location on the tracks in front of him. His duty to keep a look-out for it and to take its position into account in operating his train was absolute."

The court held that in this particular case there was negligence, both on the part of the fireman and the engineer, and stated:

> "It is our opinion that the jury was of the belief that the engineer was guilty of negligence, a conclusion that could not be escaped, but that such negligence amounted only to contributory negligence because of the concurring negligence of the fireman. In other words, the jury believed that the fireman was negligent, and that the negligence of the fireman was substantial and had a potent effect upon the situation, and that the engineer's negligence was not a sole cause of the accident."

If there was negligence on the part of the engineer in that case, there must also be in this case. After all, it was the same collision. If negligence occurred, it took place, whether petitioner or the engineer's administratrix is seeking to recover.

In view of the decisions of this Court construing the Federal Employers' Liability Act, it is a travesty for the decision of the Supreme Court of Oklahoma to allow damages to the engineer's administratrix, while under this erroneous decision of the Supreme Court of Missouri the fireman is denied any recovery for the injuries which he sustained. It appears certain that such inconsistencies in the law should be supervised and controlled, and the only authority for such supervision and control rests in this Court. It is, of course, evident that this Court has been occupied with matters of substantial moment during the past few years. However that may be, with conditions as they are in this country and throughout the world, it must not be said that the common man be shut out from the benefit of laws because the Supreme Court of the United States has not the time to pass upon a just and meritorious case. The last case which this Court has decided involving the Federal Employers' Liability Act is the case of *Great Northern Railway Co.* v. *Leonidas*, decided November 7, 1938, well over two years ago. It is inconceivable that there have not been worthy cases presented to this Court under the Federal Employers' Liability Act since that date, but nevertheless, this Court has apparently not taken jurisdiction in any of these cases. May we respectfully urge the careful consideration by the court of the instant case, to the end that justice may be done where justice is badly needed, and to the further end that the inferior courts of the United States will recognize and realize that the Supreme Court is not too busy to supervise the construction

of the Federal Employers' Liability Act when a flagrant case of misconstruction is presented to it.

Respectfully submitted,

HARRY G. WALTNER, JR.,
For Petitioner.

SIZER & MYRES,
Monett, Missouri,
For Petitioner.

APPENDIX A.

No. 29456.

KURN ET AL., *Trustees*,

v.

REESE, *Adm'x.*

Sept. 24, 1940.

Date Mandate Issue ——.

(Syllabus.)

MASTER AND SERVANT—Action under Federal Employers' Liability Act for wrongful death of engineer—Verdict for plaintiff sustained on theory that collision was result of concurring acts of negligence of fireman and engineer.

Notwithstanding the fact that an engineer is primarily charged with the duty to operate the engine pulling a train in a safe manner; and also notwithstanding the fact that standing orders and operating rules require a more cautious rate of speed at some times and places than others, yet where the lines of railroad tracks are curved so that for considerable distances the engineer has a view of only restricted distances ahead and by custom is dependent upon the fireman to keep a lookout, and where the evidence respecting whether the fireman did keep a lookout and inform the engineer of the presence of another train standing ahead, as the engineer had a right to rely upon him to do, is conflicting, the verdict in favor of the personal representative of the engineer to the effect that the accident was the result of the concurring acts of negligence of the fireman and engineer will be affirmed, the engineer's negligence being held, in effect, to be contributory only and not the proximate cause of the accident. 45 U. S. C. A. 53.

* * * * * * *

Appeal from District Court, Garfield County; J. W. Bird, Judge.

Action to recover damages for wrongful death under Federal Employers' Liability Act by Pearl C. Reese, administratrix of estate of Howard Reese, against J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Jamison, of St. Louis, Mo., and Cruce, Satterfield & Grigsby, of Oklahoma City for plaintiffs in error.

Ratner, McAlister & Mattox, of Parsons, Kan., and Simons, McKnight, Simons, Mitchell & McKnight, of Enid, for defendant in error.

BAYLESS, *C. J.:*

Mrs. Pearl Reese, administratrix of the estate of Howard Reese, deceased, brought an action in the district court of Garfield county to recover money damages for the death of deceased, an engineer, caused by the negligence of J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, his employer, and the defendants appeal from a verdict of the jury in favor of plaintiff.

This action is admittedly governed by the Employers' Liability Act, 45 U. S. C. A. 51 *et seq.*, and the decisions of the Federal courts are decisive when applicable.

There is but one proposition presented by defendants, and it involves the alleged error of the trial judge in overruling defendants' demurrer to the plaintiff's evidence. The arguments of the parties are directed to this point: admitting that the deceased was guilty of negligence, the negligence of the fireman in not giving him warning was or was not the primary cause of the accident. The plaintiff based her cause of action on the negligence of the crew of the forward train to observe rule 99, and on the negligence of the fireman in failing to keep a lookout on his side of the engine and track; and the defendants based the defense upon the alleged primary negligence of the engineer in failing to observe a special rule with respect to keeping the train under control. We do not mean to say the plaintiff admits negligence on the part of

the deceased, but rather she says that the question of fact of the fireman's negligence and its effect upon the incident is such that it must be submitted to the jury and that the deceased's negligence, if any, is not an absolute defense but a matter to be considered in mitigation of the damages.

Deceased and his fireman were the engine crew on train No. 630, which was traveling generally north, and following about 20 minutes behind train No. 1229. The tracks coming from the south into Winfield, Kan., crossed Walnut river almost due north, and about 400 feet north of the bridge begins a 5° 21′ curve to the east, 760 feet in length, after which the track ran in a straight line, in a northeasterly direction for 1,140 feet, after which begins a curve 6° 11′ to the northwest, about 900 feet in length, after which the track runs in a straight line for about 200 feet in a northwesterly direction and crosses the tracks of the Atchison, Topeka & Santa Fe Railway Company. Thus between Walnut River and the Santa Fe tracks on the north, some 3,200 or 3,300 feet away, there is what may be called an S curve. As we understand the record, there is a slight down grade from the river northward. There seem to have been structures, timber and other obstacles on each side of the track, and the evidence is in almost hopeless conflict as to when and how much the engineer and fireman could see, and when either of them could have seen train 1229 first.

Let us consider first the evidence respecting the fireman. At the time he was crossing the river bridge and until after the engine was well advanced into the first curve he could not see the standing train to the northeast because he was on the left side of the engine and it was headed north, and for some 800 feet north of the bridge the engine interposed between him and the train. After the engine had passed around the curve sufficiently to enable him to see to the northeast there was a space of upwards 2,200 to 2,400 feet to the crossing. The train was standing about 200 feet south of the Santa Fe crossing, and was about 500 feet long. It is established conclusively that there were structures and timber adjacent to the west side of the right of way that would to some extent cut off the fireman's

view. But the evidence is in irreconcilable conflict as to the point where he could have seen the train first, varying from the entire 2,200 or 2,400 feet down to 400 feet, at which it seems established he did see the standing train first.

There is proof of eyewitnesses that as train 630 approached train 1229 from the rear, the fireman was in the left window looking at a carnival northwest of the tracks, and that he did not look in the direction of the forward train until about 400 feet from it, at which time he left his seat, crossed to the right side of the cab and jumped. The fireman contradicted this flatly by asserting he was looking ahead down the tracks. He insists he could not and did not see the forward train until about 400 feet from it, at which time he called to the engineer, left his seat, crossed the cab and jumped. In a sense his testimony contradicts the eyewitnesses, but in a sense it does not. They agree with him that he first saw the forward train when about 400 feet from it, but they do not contradict him when he says he could not have seen it sooner. Their testimony merely tends to establish that he was not looking forward until he turned and saw the train. Their testimony does not contradict him about his ability to see the train sooner. The inference from their testimony is that if he had been able to see the standing train sooner, he would not have done so because his attention was directed elsewhere.

There is testimony that between the time the engine was crossing the river bridge and when it entered the first curve, there was an opportunity for the engineer to have seen the forward train for a short distance; this covered a distance of some 200 feet, but it is proven conclusively that after the engine had entered well into the first curve, a distance of 700 or 800 feet north of the bridge, the front end of the engine interposed itself in the engineer's line of vision, and he was unable thereafter to see the forward train until he was rounding the next curve. This blind space was about 1,500 or 1,600 feet. It appears to us from the record that although it was only 400 feet to the rear end of the forward train, yet the engine had not yet reached a point where the engineer could see beyond it and thus see objects on the tracks. In other words, when he passed into

the so-called blind space he was dependent upon the aid of the fireman for information as to what was ahead and upon the natural caution inherent in whatever circumstances he found himself to avoid striking obstacles on the track.

There was another employee of the company, the flagman on the head-end, who was riding the top of the first car behind the engine. He testified the engineer and fireman both had opportunities to see the forward train in time to have brought the train to a stop, but that when he became doubtful whether they had seen it, he began to yell at them and to give the stop signal and continued so to do for about 1,000 feet, and finally abandoned the train about 100 feet before it struck the forward train. He testified he could not get to the engine, and had to depend upon yelling and hand signals, which were not heard or seen.

There is a great deal of diversity of evidence concerning the rate of speed, but all of the witnesses who were competent and who expressed an opinion were agreed that Reese could have stopped his train had he seen the forward train, or had he been warned of it earlier. This aspect of the case does not account, however, for his failure to take into consideration the likelihood of the train being in front of him as it was.

The evidence is conclusive that deceased knew that train 1229 was in front of him, and his running orders gave him all the information needed, and all that he did not know was its exact location on the tracks in front of him. His duty to keep a lookout for it and to take its position into account in operating his train was absolute.

We think the evidence rather conclusively establishes that all northbound trains stop south of the Santa Fe crossing. They stop for two reasons: (1) to get the clear signal to cross the Santa Fe tracks; and (2) to get water for the engine of the northbound train, which required setting the breaks on the train, cutting the engine loose and running several hundred feet north to a tower, during which time the remainder of the train stood still south of the crossing. That was the position and condition of train 1229, when train 630 came up behind it. Train 630 was preparing to stop to take water under the same conditions.

We now take up the rules, 99 and 93, relied upon by the parties. Rule 99 provided that whenever a train was stopped, a flagman should be sent back to warn approaching trains. Rule 93, in effect, provided that when a train stopped within yard limits it was not necessary to send back a flagman, and that second and inferior trains must move within yard limits "prepared to stop unless the main line is seen or known to be clear." The trial court took the view, and correctly so we think, that rule 93 applied here. Deceased's train was a second class or inferior train, and the engineer knew that he was within the yard limits and had been for several hundred feet when he was warned of the train in front. His duty under rule 93 was to move his train within these yard limits prepared to stop unless he could see or know the line was clear.

From all of this evidence, we must determine whether the negligence of the company, as found by the jury, consisting of the failure of the fireman to keep a lookout and warn the engineer, or the engineer's violation of rule 93, in failing to move his train within the yard limits when he could not see or know whether the tracks were clear, and his failure to take into account the likelihood of finding the other train there, and his failure to slacken the speed of his train when warned of the impending peril, and his failure to see the train at the time when he had an opportunity so to do, solely caused the wreck, or whether they commingled and the engineer was guilty of contributory negligence only. In the first or third alternative the verdict must be affirmed; under the second, the judgment must be reversed.

It is our opinion that the jury was of the belief that the engineer was guilty of negligence, a conclusion that could not be escaped, but that such negligence amounted only to contributory negligence because of the concurring negligence of the fireman. In other words, the jury believed that the fireman was negligent, and that the negligence of the fireman was substantial and had a potent effect upon the situation, and that the engineer's negligence was not a sole cause of the accident.

There are a number of decisions holding that the engineer or his representative may not recover, where the en-

gineer is clearly negligent, by pointing out that the effect of the engineer's negligence might have been offset if the secondary members of the train crew had fully performed their duties. Louisville & N. *v.* Grizzard (Ala.) 189 So. 203; Hudson *v.* N. & W. Ry. Co., 106 W. Va., 437, 146 S. E. 525, and other cases. There are a number of decisions where the concurring acts of negligence on the part of other employees are held to be of sufficient importance to the entire situation that they will be held to be causative agencies, and recovery is permitted. Louisville & N. *v.* Jacobson, 218 Ala. 384, 118 So. 565; Missouri Pac. *v.* Jones (Tex. Com. App.) 24 S. W. (2d) 32, and other cases. See, 45 U. S. C. A. 53, note 26.

We feel that the difference between those differing lines of cases is found in the determination of the likelihood of the injury occurring because of the negligence of the engineer irrespective of the concurring acts of negligence on the part of other employees. If the courts feel that the negligence of the engineer cannot be excused or minimized under the particular record, they will not permit a recovery. Whereas, if the courts feel that the concurring acts of negligence of the other employees make the situations worse and put the engineer in a position where he was less likely to extricate himself from the position where his own negligence placed him, recovery is permitted. There are many things the engineer is required to do that may not be delegated, and with respect to which he cannot lessen his responsibility; and there are other duties devolving upon him that he cannot adequately discharge without the assistance of other members of the crew, and we think the present situation is one. After the engine had entered into the first curve and had protruded itself between the engineer and the standing train, it was impracticable if not impossible for him to see the standing train until his train had traveled to a point rather close to the standing train. Obviously he had to depend upon the fireman for assistance in seeing or knowing whether the track ahead was clear, and the fireman was required to help the engineer in that respect insofar as his ability and conditions permitted. The fireman was a substitute for the engineer in this situation.

The jury in this case allowed only $3,750 recovery; a

rather insubstantial sum, one that would not have been reached but for considerable reduction because of the contributory negligent conduct of the engineer, and under the record we think it is justified. The conduct of the fireman was considered negligent, and the jury was justified in finding that if he had attended to his duties properly he could have discovered train 1229, and could have warned deceased in time to have enabled him to avoid the collision. On the other hand, they were amply justified in reducing the compensatory damages to be allowed to deceased's estate because of his culpable contribution, a procedure permitted under the act.

The judgment is affirmed.

Welch, V. C. J., and Osborn, Gibson, and Davison, JJ., concur.

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